Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

T.S. BOOKS, INC.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois Fourth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE ILLINOIS OBSCENITY STATUTE IS UNCONSTITUTIONALLY VAGUE IN THAT IT FAILS TO DEFINE THE CONDUCT TO BE PROSCRIBED WITH SUFFICIENT PARTICULARITY THAT ORDINARY PEOPLE CAN KNOW WHAT CONDUCT IS PROHIBITED.

II. WHETHER THE SEARCH AND SEIZURE PROCEDURES EMPLOYED IN THE INSTANT CASE JEOPARDIZE THIS COURT'S LONG-STANDING REQUIREMENT OF SPECIAL PROCEDURAL SAFEGUARDS WHEN COMMUNICATIVE MATERIALS ARE THE SUBJECT OF A STATE SEIZURE.

III. WHETHER THE TRIAL COURT DEPRIVED THE DEFENDANT OF A FAIR TRIAL BY REFUSING TO GRANT A CHANGE OF VENUE OR CONTINUANCE TO AVOID JURORS WHO HAD JUST BEEN TOLD, BY THE PRESS AND THE PROSECUTOR, THAT THE PETITIONER BOOKSTORE CHARGED WITH OBSCENITY HAD ATTRACTED TO THEIR COMMUNITY A PREDATORY CRIMINAL WHO KIDNAPPED AND MOLESTED A LOCAL CHILD.

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, T.S. BOOKS, INC.,[1] prays that a Writ of Certiorari issue to review the judgment and unpublished opinion of the Appellate Court of the State of Illinois, Fourth District, entered on August 10, 1994.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Fourth District, was an order pursuant to Illinois Supreme Court Rule 23 and, thus, was unpublished. A

[1] There are no parent companies, subsidiaries, or affiliates of the corporation.

copy of this order is included in the Appendix as "Exhibit A".

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(a) for review by certiorari of the decision of the Illinois Appellate Court for the Fourth District.

A written opinion and order was issued by the Appellate Court on August 10, 1994. A Petition for Rehearing was denied on September 14, 1994, a copy of which denial is included in the Appendix as "Exhibit B". A timely-filed Petition for Leave to Appeal to the Illinois Supreme Court was denied on December 6, 1994, a copy of which denial is included in the Appendix as "Exhibit C". The Petitioner filed an Affidavit of Intent to Seek Review in the United States Supreme Court, and a Motion to Stay the Mandate with the Illinois Supreme Court. On December 16, 1994, the Motion to Stay was granted, and a copy of the order staying the mandate is included in the Appendix as "Exhibit D".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States and the Illinois Obscenity Statute (720 ILCS 5/11-20(a), (b), (c) (West 1992)) are set forth in the Appendix as "Exhibit E" and "Exhibit F".

STATEMENT OF THE CASE

The Petitioner in this case is T.S. BOOKS, INC., the corporate owner and operator of the Hyway News Bookstore, an adult bookstore located at the intersection of Illinois State Route 1 and Interstate 70, Marshall, Clark County, Illinois. This bookstore sells sexually explicit materials to adults, and admission to the bookstore is restricted to adults.

On March 1, 1993, Rick Kerr submitted a complaint for search warrant supported by an affidavit and two (2) magazines which he had purchased from Petitioner's store. In the affidavit, he summarized his visits to the bookstore on February 26, 1993 and March 1, 1993. In his first visit, he observed approximately five (5) minutes of each of two films which he described as "peep shows," and summarized the sexual activities he had observed in each of those films. He further described viewing longer segments of those same two peep shows on his March 3, 1993, visit, and detailed the activities contained therein. He also described his viewing of a "feature film" entitled, "Rumphumpers," including a relatively detailed description of the first 20 to 30 minutes of that film. Finally, in his affidavit, he described in a conclusory way the types of magazines available throughout the bookstore, including the circumstances of his purchase of the two magazines submitted with the affidavit.

A search warrant was issued authorizing *inter alia* the seizure of one (1) copy of any magazine containing depictions of certain specified sexual conduct, a videotape entitled, "Rumphumpers," and the two "peep show" movies as described in the affidavit.

On March 3, 1993, Clark County law enforcement officials raided the store pursuant to the following procedure. Two deputies roamed the aisles seizing magazines which they felt met the criteria of the search warrant. They brought their picks to a third deputy who also examined each magazine, but only long enough to verify at least one depiction of the described sexual conduct and to place it in an evidence bag. He rejected some as not meeting the criteria, and returned them to employees of the store.

One (1) videotape ("Rumphumpers") and 143 magazines were seized in all. Petitioner was charged with 144 counts of Obscenity; a separate count for the videotape and each magazine. An employee of the bookstore, Donna Kerins, was charged in a separate case with 3 counts of Obscenity based upon the same videotape and two (2) of the same magazines.

The Petitioner pleaded not guilty and filed a pretrial motion to quash the search warrant, suppress evidence, and order the return of items seized as being taken in violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States. This motion was denied after an evidentiary hearing.

The Petitioner also filed a motion to dismiss alleging that the Illinois Obscenity Statute was unconstitutional, in violation of the First and Fourteenth Amendments to the Constitution of the United States. After hearing and argument, this motion was also denied.

On July 22, 1993, the cases against this Petitioner and Donna Kerins were consolidated for trial purposes. The case then proceeded to jury trial commencing on Monday,

November 8, 1993. On Thursday, November 4, 1993, the *Marshall Independent*, a weekly newspaper of general circulation in Clark County, published a front-page article with the headline, "Bookstore cited in confession". That article connected the bookstore with an unrelated child abduction and molestation case. In the article, the State's Attorney for Clark County discussed the arrest and was quoted as saying, " . . . on the eve of the upcoming adult bookstore misdemeanor trial, this information is ironic."

A second front-page article discussed a campaign being waged by the Marshall Ministerial Alliance and local business persons to take a stand against pornography by wearing white ribbons and attending court on November 8, 1993.

On the morning the trial was scheduled to commence, the defendants filed a joint motion to change the place of trial. The trial judge proceeded with *voir dire* to evaluate the motion. After both sides exhausted their peremptory challenges, a jury of twelve (12) and one (1) alternate was seated. The court then denied the motion.

Special interrogatories were submitted with the jury instructions and verdict forms. They required the jury to indicate their unanimous decision of the obscenity *vel non* of each charged item. They were further instructed to check neither if they reached no consensus respecting any particular title.

The jury returned guilty verdicts on each defendant. In considering the videotape, "Rumphumpers," with respect to the Petitioner, the jury indicated that it could not reach a consensus. In considering the same videotape

with respect to co-defendant Kerins, the same jury unanimously concluded that it was "obscene."[2] The Petitioner filed a timely post-trial motion, which was denied. The Petitioner was sentenced to pay a fine and costs.

On appeal before the Fourth District Appellate Court, the Petitioner questioned the constitutional validity of the search and seizure procedure, the Illinois Obscenity Statute, and the court's failure to grant the motion to change the place of trial. In an unpublished order entered August 10, 1994, the Fourth District Appellate Court rejected all of the arguments raised by this Petitioner. In doing so, the court relied on previous opinions addressing similar issues; *e.g. People v. Sequoia Books, Inc.*, 495 N.E.2d 1292 (Ill.App. 1986); *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615 (1973).

Following the December 6, 1994, denial of leave to appeal by the Illinois Supreme Court, Petitioner seeks certiorari review.

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[2] Defendant Kerins' conviction was overturned by the Appellate Court based upon insufficient evidence to establish *scienter*.

REASONS FOR GRANTING THE WRIT

I.

THE ILLINOIS OBSCENITY STATUTE IS UNCONSTITUTIONALLY VAGUE IN THAT IT FAILS TO DEFINE THE CONDUCT TO BE PROSCRIBED WITH SUFFICIENT PARTICULARITY THAT ORDINARY PEOPLE CAN KNOW WHAT CONDUCT IS PROHIBITED.

This case presents a unique opportunity for this Court to reexamine *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), and to recognize its inherent unworkability. This Court has repeatedly held that the United States Constitution "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolander v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983); *see also Pope v. Illinois*, 481 U.S. 497, 515, 107 S.Ct. 1918, 1928 (1987) (Stevens, J., dissenting); *Papachristou v. Jacksonville*, 405 U.S. 156, 162-63, 168-69, 92 S.Ct. 839, 843-44, 846-47 (1972).

When the First Amendment is implicated, this Court has been especially intolerant of vague statutes. *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247 (1974); *Grayned v. Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99 (1972); *Smith v. California*, 361 U.S. 147, 151, 80 S.Ct. 215, 217 (1959). Petitioner concedes that obscene materials are not protected by the First Amendment. The problem, dramatically illustrated by the jury verdicts in the instant case, is now, and always has been, in attempting to define obscenity with sufficient definiteness to

allow for the criminalization of its distribution. As Mr. Justice Black said in dissent,

> . . . Ginzburg . . . is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal.

Ginzburg v. United States, 383 U.S. 463, 476, 86 S.Ct. 942, 950 (1966).

In 1987, Justice Scalia called for a "reexamination of *Miller*" because of "all of today's opinions." *Pope v. Illinois*, 481 U.S. 497, 505, 107 S.Ct. 1918, 1923 (1987). *Pope* was a plurality decision in which five (5) justices wrote separate opinions. Justice Stevens, in dissent, pointed out that in recent years, six (6) members of the Court had expressed the opinion that the First Amendment, at the very least, precludes criminal prosecution for sales of sexually explicit materials to consenting adults. *Pope*, 481 U.S. 497, 513, 107 S.Ct. 1918, 1927 (1987) (Stevens, J., dissenting).

The jury verdicts and special interrogatories in the instant case dramatically demonstrate the wisdom of those opinions. A single jury in evaluating the obscenity *vel non* of a single videotape, "Rumphumpers," could not reach the same result twice. With respect to the Petitioner's verdict of guilty, that jury indicated that other charged materials were, in fact, obscene, but could not reach a unanimous decision regarding the videotape, "Rumphumpers". With respect to co-defendant Donna Kerins, the same jury, during the same deliberations,

unanimously concluded that the same videotape was, in fact, obscene.

It is difficult, if not impossible, to imagine a penal statute which fails more woefully in its attempts to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner which does not encourage arbitrary and discriminatory enforcement. "If even-handed and accurate decision making is not always impossible under such a regime, it is at least impossible in the cases that matter." *Pope*, 481 U.S. 497, 505, 107 S.Ct. 1918, 1923 (Scalia, J., concurring).

Two defendants were charged with the offense of obscenity based upon the distribution of a single videotape. A single jury heard their cases jointly and told one that the videotape is obscene, you are guilty of a crime. The same jury told the other, we cannot decide if this videotape is obscene. How could a law be more susceptible to arbitrary and discriminatory enforcement?

This Court should use this opportunity to reexamine the *Miller* test and reaffirm the principle that, before conduct can be criminalized, it must be defined with sufficient definiteness so that ordinary people can understand what conduct is prohibited, and in a manner which does not encourage arbitrary and discriminatory enforcement.

II.

THE SEARCH AND SEIZURE PROCEDURES EMPLOYED IN THE INSTANT CASE JEOPARDIZE THIS COURT'S LONG-STANDING REQUIREMENT OF SPECIAL PROCEDURAL SAFEGUARDS WHEN COMMUNICATIVE MATERIALS ARE THE SUBJECT OF A STATE SEIZURE.

This Court has a long history of requiring special procedural safeguards when state authorities wish to seize expressive material. In *Marcus v. Search Warrants of Property*, 367 U.S. 717, 81 S.Ct. 1708 (1961), it struck down a Missouri search warrant procedure that failed to provide "the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled." *Id.*, 367 U.S. at 731, 81 S.Ct. at 1716. In discussing the action of the police officers, the Court found no fault on their part as they "were provided with no guide to the exercise of informed discretion because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." *Id.*, 367 U.S. at 732, 81 S.Ct. at 1716.

To protect against abuse in this area, this Court has required a prior judicial determination of probable cause by a neutral magistrate. *Heller v. New York*, 413 U.S. 483, 492-93, 93 S.Ct. 2789, 2795 (1973). Regarding discretion of the executing officers, this Court has stated, "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1927); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 512 (1965).

In 1986, for the first time, this Court approved a warrant which had been issued by a judicial officer based

upon a review of affidavits rather than an examination of the materials sought to be seized. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610 (1986). In so doing, however, Chief Justice Rehnquist, writing for the Court, discussed the history and types of special requirements that this Court has always required before allowing the seizure of films or books on the basis of their content. *Id.*, 475 U.S. at 873, 106 S.Ct. at 1614.

In *P.J. Video*, a search warrant was issued authorizing the seizure of ten (10) specific films following the review of an affidavit which described in some detail each of the films sought to be seized. In that case, this Court reaffirmed the principles of requiring a step prior to the seizure designed to "focus searchingly on the question of obscenity" *Id.*, 475 U.S. at 874, 106 S.Ct. at 1614, and the necessity that a neutral magistrate issue the warrant after a determination of probable cause.

Following the reaffirmation of these principles, the Court engaged in a thorough discussion of the content of that affidavit. Briefly summarizing the content of the affidavits, this Court concluded that there was adequate evidence available to establish probable cause that *each* of the three prongs of the New York Obscenity Statutory definition had been met.

In this case, the Illinois Appellate Court for the Fourth District side-stepped this issue. It approved the search warrant in reliance upon *People v. Sequoia Books, Inc.*, 145 Ill.App. 3d 1054, 495 N.E.2d 1292 (1986), because the language in it was "virtually identical to that approved in *Sequoia Books.*" App. 4. Substantially similar

search warrant language was also approved by the Federal Court of Appeals for the Seventh Circuit Court in *Sequoia v. McDonald*, 725 F.2d 1091 (1984). The decisions of the Illinois Appellate Courts and the Seventh Circuit Court of Appeals stand in stark contrast to the long history of procedural safeguards which this Court has demanded when materials are to be seized based on their contents.

In the instant case, the magistrate was provided with an affidavit which described three (3) films in some detail and generally described in a conclusory manner the rest of the store, including magazines therein. Based upon that affidavit, Judge Resch issued a search warrant authorizing the seizure of the three films specifically described in the affidavit and a single copy of any magazine which contained depictions of certain specified sexual conduct.

The procedure employed herein and approved by the *Sequoia* cases allows for the seizure of numerous magazines without any meaningful judicial participation. There is no step prior to the seizure designed to focus searchingly on the question of obscenity. Rather, law enforcement officers conducted a cursory examination and seized any magazines which contained at least a single depiction of the types of sexual conduct described in the search warrant. There was no consideration of the context of the depiction in relation to the material as a whole. There was no consideration of the serious literary, artistic, political or scientific value, or lack thereof. There was no consideration of the predominate theme of the material as a whole. There was no consideration of whether the depiction was patently offensive. In short,

the procedures utilized in the instant case fly in the face of the well-established principles laid down by this Court in a line of cases commencing with *Marcus v. Search Warrants of Property*, 367 U.S. 717, 81 S.Ct. 1708 (1961).

This search warrant is indefensible. Its description of the materials to be seized, in terms of the direction it affords executing officers, is virtually indistinguishable from language directing the seizure of all titles of a particular series of works.

The instant warrant also smacks of the open-endedness which this Court disallowed in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319 (1979), wherein a town magistrate accompanied law enforcement officials to a store, made a cursory examination of various magazines, and then ordered the seizure of the magazines he had reviewed, "along with other copies of the same" or "similar" magazines. *Lo-Ji*, 442 U.S. at 323, 99 S.Ct. at 2322. The only distinction was that in this case, the executing officers were searching for at least a single depiction of a specified sex act as opposed to a title identifying a magazine as part of a particular series or similarity to another magazine.

This Court should grant certiorari in the instant case to correct the conflict between its own history of demanding meaningful judicial participation prior to the seizure of communicative materials and the interpretation given by the Illinois Appellate Courts and the Federal Court of Appeals for the Seventh Circuit.

III.

THE TRIAL COURT DEPRIVED THE PETITIONER OF A FAIR TRIAL BY REFUSING TO GRANT A CHANGE OF VENUE OR CONTINUANCE TO AVOID JURORS WHO HAD JUST BEEN TOLD, BY THE PRESS AND THE PROSECUTOR, THAT THE PETITIONER BOOKSTORE CHARGED WITH OBSCENITY HAD ATTRACTED TO THEIR COMMUNITY A PREDATORY CRIMINAL WHO KIDNAPPED AND MOLESTED A LOCAL CHILD.

On the eve of this obscenity trial, the prosecutor released to the local newspaper a statement linking the Petitioner bookstore to a confessed child abductor and molester, who said he patronized the bookstore in between searching for victims. Against a background of already extreme community hostility toward the Petitioner, as revealed through *voir dire*, and in the unique context of an obscenity prosecution, where a defendant's guilt or innocence depends partially upon the perceived prurient appeal of its wares as judged by the standards of the community, the trial court's refusal to grant a change of venue or continuance violated the Petitioner's Fourteenth Amendment due process right to a fair trial.

The *Marshall Independent*, a newspaper of general circulation in Clark County, published a front page story four days before the trial relating the arrest of David Lee Thompson, who confessed to kidnapping and molesting a local six-year old girl. The headline read, "Bookstore cited in confession," and the article reported that Thompson linked the Petitioner to his crime:

> Thompson said in his confession that the day of the Mead abduction, he had purchased materials from the Hy-Way News adult bookstore in Marshall. He then parked his vehicle in town and, while walking around, watched for possible target houses and victims. After targeting two or three places, he went back to the bookstore. That evening, he said he followed through with his plan and abducted the [name omitted] girl.

Then, the article quoted the prosecutor, State's Attorney David Lewis, attributing significance to this link with the Petitioner and maximizing the prejudice by referring specifically to the upcoming trial: "Lewis said that on the eve of the upcoming adult bookstore misdemeanor trial, this information is ironic." This thoughtless (at best) announcement was inexcusable misconduct that bears directly on this Court's evaluation of the trial judge's decision. *Sheppard v. Maxwell*, 384 U.S. 333, 361, 86 S.Ct. 1507, 1521 (1966) (stating that "[t]he fact that many of the prejudicial news items can be traced to the prosecution . . . aggravates the judge's failure to take any action.")

The prosecutor could not have chosen a more crucial time to lose oratory control; his inflammatory comment fanned to a blaze an already hot animosity towards the Petitioner bookstore in the general community. Clark County has a total population of only 15,921 and Marshall, the county seat, has a population of only 3,555. The police raid of the Petitioner bookstore was big news in this tight community and, over the next six months, the upcoming trial became a rallying point for community outrage over the Petitioner's very existence. Expressions

of this outrage filled the *voir dire*, ranging from general offense that the Petitioner was allowed to do business in Clark County to heated opinions that the Petitioner would and should be run out of town or torn down.

Predictably, *voir dire* also revealed widespread knowledge of the newspaper article. Despite the best efforts of defense counsel, six of the jurors seated had been exposed to the article's prejudicing information and comment.

In the unique context of an obscenity prosecution, a jury composed of persons who were exposed to the statements of Mr. Thompson and State's Attorney Lewis in the newspaper article could not have given the Petitioner a fair trial. An essential element of the offense of obscenity is that the material in question "appeals to the prurient interest." 720 ILCS 5/11-20(b)(1) (West 1993); *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615 (1973). Where, as in this case, the materials alleged to be obscene are sexually explicit adult magazines and videotapes, prurient interest forms the center of the battle at trial.

Child abduction and molestation is the clearest and most disgusting example of prurient interest, exemplifying every definition of that term given to the jury during the trial, and the prosecutor told the jury that the Defendant bookstore attracted to their community a predator with that interest in his mind. The mere thought of child abduction and molestation arouses a passionate abhorrence in even the most rational people in our society. The article suggested an outsider, bent on a vile crime, drawn to the Defendant bookstore in Clark County as he hunted and tracked down a local girl to kidnap and molest. It is

unreasonable to think that the jury could rationally detach such a passion-evoking and prejudicial piece of information as the newspaper article provided.

Moreover, a jury determines prurient interest by "community standards." *Id.* The article's connection between the draw of the Petitioner's wares and a confessed child molester fed directly into the hatred for the Defendant bookstore as a blight on Clark County's small, tight-knit community. Within that hateful atmosphere four days after the local press and prosecutor capitalized on a heinous crime to cast the Petitioner as a pariah, could there be any doubt on which side of the "community standards" view of prurient interest a Marshall County jury would place a sampling of the Petitioner's merchandise?

This Court has guarded zealously a defendant's right to a change of venue or continuance in the face of extreme community prejudice. "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. State of Colorado ex rel. Attorney General*, 205 U.S. 454, 462, 27 S.Ct. 556, 668 (1907) (Holmes, J.). The danger of private talk or public print infecting a trial is real and substantial, requiring "appellate tribunals . . . to make an independent evaluation of the circumstances." *Sheppard*, 384 U.S. at 362, 86 S.Ct. at 1522. "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.*, 384 U.S. at 363, 86 S.Ct. at 1522.

On the eve of trial, the press and prosecutor showed the jurors in this case the embodiment of prurient interest drawn to their community by the Petitioner bookstore, visiting the bookstore, noticing items offered for sale, and making purchases, all while actively searching for local child victims to abduct and molest. Those jurors could not give the Petitioner a fair trial. The trial court deprived the Petitioner of due process by ignoring the danger and refusing to grant a change of venue or at least a continuance.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment and order of the Appellate Court of the State of Illinois, Fourth District, because of the significant issues presented under the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

T.S. Books, Inc., d/b/a
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EXHIBIT A

Nos. 4-93-1040, 4-93-1075 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-93-1040) T.S. BOOKS, INC. d/b/a HY-WAY NEWS BOOKSTORE, Defendant-Appellant.	Appeal from Circuit Court of Clark County No. 93CM35
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-93-1075) DONNA KERINS, Defendant-Appellant.	(Filed Aug. 10, 1994) No. 93CM37 Honorable Tracy W. Resch, Judge Presiding.

ORDER

The corporate defendant, T.S. Books, Inc., d/b/a Hy-Way News Bookstore, and its salesclerk, Donna Kerins, were convicted of violating the obscenity statute (720 ILCS 5/11-20(a)(1), (a)(3) (West 1992)). The corporation was sentenced to pay a $1,000 fine. Kerins was sentenced to 12 months' conditional discharge and a $1,000 fine. On appeal, defendants contend the search warrant issued in

this case was impermissibly treated as a general warrant by the police officers who executed it, the trial court erred in denying a motion to change venue or continue the trial due to prejudicial pretrial publicity, the evidence against Kerins is insufficient to establish her *scienter* for the offense, and the Illinois obscenity statute is unconstitutional.

Defendant, T.S. Books, Inc., was charged by information with 144 counts of misdemeanor obscenity. One count was withdrawn at trial after it was determined to be a duplicate. Counts 1 through 143 involved single copies of magazines. Count 144 involved a videotape. Defendant Kerins was charged with three counts of obscenity for selling two magazines and exhibiting a videotape. The videotape and one of the magazines were common to each defendant. Following a jury trial, T.S. Books, Inc., was found guilty on 109 counts, all involving magazines. The jury also determined that 11 of the magazines were not obscene and was unable to reach unanimous agreement on 23 additional items, including the videotape. Kerins was convicted on all three counts applicable to her. Based on defendants' post-trial motion, the court vacated the verdict of obscenity as to the videotape because, although the jury found the videotape to be obscene as to Kerins, it reached no verdict on the same videotape as it applied to the corporate defendant. On appeal, we note that defendants do not challenge the jury's verdicts insofar as they determined that the materials were legally obscene.

Defendants contend that the search warrant issued in this case constituted a general warrant and was treated as such by the executing officers and the seized materials

should have been suppressed. During a hearing on defendants' motion to suppress, Officer Rick Kerr testified that he visited the bookstore, purchased a copy of a magazine, and viewed videotapes which were submitted with a complaint for search warrant. The warrant issued by Judge Resch authorized the search and seizure of:

> "a. One copy of any magazine containing depictions of penetration in the following sexual acts: cunnilingus, fellatio, anal intercourse, insertion of tongue into anus, and vaginal intercourse.
>
> b. One copy of any magazine depicting male or female persons with genitals or breasts being fettered, bound, or otherwise physically restrained."

Officer Jerry Lorton and four other officers executed the warrant. In describing that process, Lorton testified:

> "Officer Davison and Officer Parsely would go to the magazine racks, view the magazines, which were all in plastic, or at least the overwhelming majority were in plastic, sealed plastic. If they felt that they met the criteria, they would bring them to me. As I looked through them, if I felt that they met the criteria * * * if it met the criteria listed, I would place it in the evidence bag * * * ."

In all, one videotape and single copies of 143 magazines were seized. One duplicate magazine was seized as well. Some of the magazines brought to Lorton by the other deputies were rejected as not meeting the criteria and were returned to Kerins who was working in the bookstore. At some point several hours after the search began, Lorton stated that he realized the officers had collected

over 100 exhibits and, because they had been in the bookstore for quite some time, they ended the search.

Defendants' contention that the warrant was a general warrant and was treated as such by the officers is without merit. The warrant in this case describing specific sexual conduct and depictions exhibited in magazines to be seized is virtually identical to that approved in *People v. Sequoia Books, Inc.* (1986), 145 Ill. App. 3d 1054, 495 N.E.2d 1292. In that case, the court upheld the constitutionality of a warrant against the same challenge made here, namely, that it was a general warrant. In doing so, the court observed:

> "The warrant here authorized the officers to seize only magazines which contained one or more of the explicit sexual acts described in the warrant, and, in fact, the officers only seized a copy of each magazine. The purpose of the search in this case was not to suppress materials, but was to obtain evidence of an alleged criminal offense.
>
> * * * The language of the search warrant here may initially appear to be general; however, when compared to the 'general' warrants of the past, we conclude that the conduct intended to be prevented, that is the *ad hoc* determinations of obscenity by law-enforcement personnel suppressing first amendment rights, is accomplished by this search warrant because it is a search for evidence and a seizure of items depicting certain explicit sexual conduct which, by prior judicial determination, indicates a fair probability that they meet the three-prong obscenity test." *Sequoia Books,* 145 Ill. App. 3d at 1062-63, 495 N.E.2d 1297-98.

The case of *People v. Eagle Books, Inc.* (1992), 151 Ill. 2d 235, 602 N.E.2d 798, is clearly distinguishable. In that case, although the police were armed with a warrant which authorized seizure of magazines containing depictions of specific sexual acts, one officer's instructions, irrespective of the warrant, were to seize any magazine with any kind of sexual conduct in it. No attempt was made to evaluate text and a magazine would be seized if the sexual conduct appeared only on the front cover or on one page. One hundred fifty-five magazines were initially seized, including nine duplicate and one triplicate set of copies.

While executing the warrant, a delivery man arrived with four or five more boxes of magazines. After opening one or two of the boxes, a second complaint for search warrant was secured and an additional 700 magazines were seized. The supreme court concluded the search was a general one, especially when the recently arrived boxes of magazines were removed from the store premises after the officers intercepted their delivery even though they did not open or inventory several of the boxes of materials. Given the large number of magazines seized without meaningful evaluation of whether the materials met the requirements of the warrant, the court concluded the search was constitutionally invalid.

In this case, only one apparent duplicate magazine was seized and all of the materials were reviewed for content prior to seizure. Defendant points to the testimony of Officer Lorton that he stopped the search after he determined he had more than 100 exhibits. Defendant claims this is evidence that too much discretion was being exercised by the police because more zealous or energetic

officers would not have stopped until every appropriate item in the store had been seized. This argument is without merit.

In most cases, the claim is that the police seized too many articles. Here, in contrast, defendant argues the police seized too few magazines. Based on the evidence presented at the motion to suppress hearing, we do not believe the officers abused the discretion necessarily inherent in determining whether the materials conform to the terms of the type of warrant issued in these cases. The warrant described with particularity the type of activity depicted which would render the object subject to seizure. Each document was examined to determine whether it met the criteria. There was no wholesale seizure of documents without this individualized examination and, with one exception, only one copy of each document was seized. The trial court did not abuse its discretion in refusing to suppress the warrant.

Defendants' next argument is that the trial erred in failing to change venue or continue the trial because of prejudicial pretrial publicity. Defendant notes that the record demonstrates that this bookstore is located in a relatively rural community and that during *voir dire* it became clear that many citizens in the area were antagonistic toward the existence of the bookstore in their community. Of most concern to defendants, however, was an article which appeared in the *Marshall Independent* newspaper several days prior to the start of trial. The article describes the arrest of a man in Indiana who allegedly confessed to abducting and sexually assaulting a six-year-old local resident two years earlier. In the confession, the man allegedly stated that he had visited the bookstore on

the day of the abduction. State's Attorney David Lewis is quoted in the article as stating, "[o]n the eve of the upcoming adult bookstore misdemeanor trial, this information is ironic."

Defendants presented a written motion to change the place of trial on the date jury selection began. During the course of the hearing on the motion, the trial court expressed great concern about the appearance of the article and the state's attorney's role in making this statement which potentially imperiled the prosecution. The court took the matter under advisement, however, so that *voir dire* could be conducted to determine if a fair and impartial jury could be selected from within the community. A jury of 12 and one alternate was ultimately selected, and the motion was denied. Defendants contend, initially, that the prejudice in the community toward the bookstore was so great that, for this reason alone, the trial court should have granted a motion to change venue. However, the supreme court has held that a motion to change venue which is filed after the trial court has ruled on a matter going to the merits of the case comes too late. (*People v. Yonder* (1969), 44 Ill. 2d 376, 387, 256 N.E.2d 321, 327.) To the extent that the motion in this case was based upon general community prejudice to the defendants, it is clear that defendants were well aware of the existence of these sentiments within the community long before the start of trial. The motion, in that respect, was untimely.

As to the effect of the newspaper article, this issue was thoroughly explored by the trial judge and the attorneys who were permitted to ask questions during *voir dire*. Given its concern that the article may have produced

unnecessary and unwarranted prejudice, the trial court liberally permitted challenges for cause as to these members of the venire who indicated they could not be fair or could not set aside their preconceived notions about the guilt or innocence of these defendants.

Of the 13 jurors ultimately chosen, seven had not seen or read the article. One saw the article but did not read it. Three read parts of it but only learned that the trial was about to begin and surmised that they were being called as jurors for this case. Two read the article but, upon detailed questioning, the court determined that nothing these last two jurors read would influence their decision in this case. Of the jurors seated, only one was unsuccessfully challenged for cause. In addition, there is the fact that the jury only convicted the corporate defendant on 109 out of the 143 counts.

The supreme court has identified the essential qualifications of jurors with regard to partiality. An impartial juror must demonstrate an understanding that (1) the defendant is presumed innocent; (2) the defendant is not required to offer any evidence on his own behalf; (3) the defendant must be proved guilty beyond a reasonable doubt; and (4) the defendant's failure to testify cannot be held against him. (*People v. Zehr* (1984), 103 Ill. 2d 472, 477, 469 N.E.2d 1062, 1064.) A prospective juror may not be excused unless his or her views prevent or substantially impair the performance of his duties as a juror an accordance with his instructions and his oath. *Wainwright v. Witt* (1985), 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52, 105 S. Ct. 844, 852; *People v. Pitsonbarger* (1990), 142 Ill. 2d 353, 385, 568 N.E.2d 783, 796.

Harmful publicity within a community alone does not establish proof of community prejudice sufficient to warrant a change of venue. (*People v. Gendron* (1968), 41 Ill. 2d 351, 243 N.E.2d 208.) A motion for change of venue must be granted only when there are reasonable grounds to believe that the prejudice alleged actually exists and that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial. The jurors who are ultimately chosen need not be totally ignorant of the facts and issues involved, but must be able to lay aside their opinions and decide the case on the evidence presented at trial. *People v. Lucas* (1989), 132 Ill. 2d 399, 421, 548 N.E.2d 1003, 1011.

While defendants are correct that a potential juror's answers to questions indicating that the juror can be fair are not determinative, the decision as to whether a potential juror is impartial is within the sound discretion of the trial court and is best tested in the crucible of examination and cross-examination during *voir dire*. It is not necessarily the correctness of the trial court's ruling on the motion for change of venue or the amount of publicity involved, but whether upon the record as a whole, the defendants received a trial before a fair and impartial jury since denial of a motion to change venue is proper if the defendants actually received a fair trial. (*People v. Taylor* (1984), 101 Ill. 2d 377, 397, 462 N.E.2d 478, 487.) On this record, we conclude the denial of the motion to change venue or delay the start of trial was not an abuse of discretion.

The case of *Taylor*, upon which defendants rely, is distinguishable. In that case, the supreme court reversed convictions based on pretrial publicity when jurors

learned that one potential codefendant had passed a lie detector test and the other had not. Principal among the reasons for granting a retrial was the existence of impermissible inferences people would harbor based on unreliable and inadmissible polygraph evidence. Moreover, in *Taylor,* the inadmissible evidence was directly related to the underlying offense. In this case, the information in the article concerning the arrest of an alleged child molester in an unrelated case may have been prejudicial, but was irrelevant to anything pertaining to the guilt or innocence of these defendants.

Defendant Kerins argues that the State failed to prove she acted with the requisite *scienter* and, for that reason, her conviction cannot stand. We agree. In this case, Kerins was charged with the sale of two magazines. At trial, the parties entered the following stipulation which was the only evidence presented to the jury on this issue. That stipulation contained the following:

"Now comes the parties and stipulate that:

* * *

> 2. On February 26, 1993, the defendant Donna Kerins was an employee of T.S. Books, Inc., doing business as Hy-Way News adult book store and on that date during the late morning hours was the only employee on duty and then *did sell or otherwise make available two magazines* and one video tape previously marked as exhibits 145, 146 and 104, respectively, at the premises of Hy-Way News." (Emphasis added.)

We note that had the stipulation been used as the basis for a charging instrument, it would have been

stricken as duplicitous. (*People v. Eagle Books, Inc.* (1992), 151 Ill. 2d 235, 244 45, 602 N.E.2d 798, 801-02.) See *People v. Heard* (1970), 47 Ill. 2d 501, 504, 266 N.E.2d 340, 342, which holds that a charge which states the crime in the disjunctive "or" will not be sufficient where the statute names disparate and alternative acts, any one of which will constitute the offense.

The State responds that *scienter* may be proved by circumstantial evidence (*People v. Rode* (1978), 57 Ill. App. 3d 645, 648, 373 N.E.2d 605, 608), and that even casual examination of a magazine cover which is obscene is sufficient to establish liability. (*People v. Moore* (1977), 53 Ill. App. 3d 75, 77-78, 368 N.E.2d 586, 588.) The flaw in the State's arqument is that, in the absence of any clear and unequivocal statement in the stipulation that Kerins sold the magazines, there is no proof she ever saw them – a fact which is necessary to establish *scienter* under the circumstances. The State's further argument that because this was an adult bookstore full of similar materials, her *scienter* may be inferred is also not persuasive. There is no evidence that all of the materials available in the bookstore were legally obscene and the jury verdict supports this conclusion.

The State charged Kerins with sale of the magazines. The State was obligated to prove a sale. The stipulation is not explicit and permits the jury to conclude that Kerins merely made the magazines available for sale. Hence, the jury could not have convicted Kerins except by speculation in the absence of any proof of sale.

Defendants' final argument is that the Illinois obscenity statute is unconstitutional. Defendants concede

that the current Illinois obscenity statute is patterned after the standards enunciated in *Miller v. California* (1973), 413 U.S. 15, 24, 37 L. Ed. 2d 419, 431, 93 S. Ct. 2607, 2615. Based on concurring and dissenting opinions in the more recent case of *Pope v. Illinois* (1987), 481 U.S. 497, 95 L. Ed. 2d 439, 107 S. Ct. 1918, which suggests that the various tests for obscenity are wrong or should be reexamined, defendant asks this court to make an independent determination that the obscenity statute is unconstitutional. However, this court is not empowered to reexamine precedent which is found to be constitutional. (*People v. Tannahill* (1976), 38 Ill. App. 3d 767, 348 N.E.2d 847.) The *Miller* test for obscenity embodied in the current Illinois obscenity statute has been deemed controlling in all subsequent decisions since its formulation two decades ago, irrespective of the minority opinions expressed in *Pope*. We are not free to ignore precedent of the United States Supreme Court.

For the foregoing reasons, we affirm the convictions of the corporate defendant, T.S. Books, Inc. The convictions of Donna Kerins are reversed.

No. 4-93-1040: affirmed.

No. 4-93-1075: reversed.

COOK, J., with McCULLOUGH, P.J., and STEIGMANN, J., concurring.

EXHIBIT B

(Seal)

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
SUPREME COURT BUILDING
SPRINGFIELD 62701-1792

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

DATE: 09/14/94

RE: People v. Books, T.S. d/b/a Hy-Way
News Bookstore
General No.: 4-93-1040
Clark 93CM35
Rule 23 filed 8/10/94

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue in 7 days to the Clerk of the Circuit Court unless an affidavit of intent to seek review in the Illinois Supreme Court (Rule 368(b)) is filed in this court. It will also issue in the consolidated case 4-93-1075 at the same time.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

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EXHIBIT C

78008

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

December 6, 1994

Mr. Roger B. Webber
Beckett & Associates, P.C.
P. O. Box 988, 508 S. Broadway
Urbana, IL 61801-0988

No. 78008 – People State of Illinois et al., respondents, v. T.S. Books, Inc., etc., petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 28, 1994.

EXHIBIT D

GENERAL NO. 78008

IN THE SUPREME COURT
OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee-Respondent, v. T.S. BOOKS, INC., d/b/a HY-WAY NEWS BOOKSTORE, Defendant-Appellant-Petitioner.	) Appeal from the) Appellate Court of the) Fourth District, No.) 4-93-1040)) From the Circuit Court) of the Fifth Judicial) Circuit, Clark County,) Illinois, Trial Court) No. 93-CM-35) Hon. Tracy W. Resch) Judge Presiding

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ORDER
(Filed Dec. 16, 1994)

THIS CAUSE coming on for consideration on the motion of Petitioner to stay the mandate of this Court pending an application for Certiorari in the United States Supreme Court.

IT IS ORDERED that the motion of Petitioner to stay the mandate is hereby:

Allowed X
~~Denied~~ ___

Entered
~~Dated~~: 12/14, 1994

/s/ Ben Miller
Justice

EXHIBIT E

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT F

5/11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community

standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears form the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

* * *